No. 75-1000

In the Supreme Court of the United States

OCTOBER TERM, 1975

HAROLD A. BOIRE, REGIONAL DIRECTOR OF THE TWELFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PILOT FREIGHT CARRIERS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE REGIONAL DIRECTOR OF THE TWELFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD

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The petition for a writ of certiorari, filed on January 14, 1976, presented the question whether Section 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j), empowers a district court—upon finding reasonable cause to believe that the employer has committed unfair labor practices tending to de-

stroy the union's majority status and to preclude the holding of a fair election—to issue a bargaining order pending a final determination of the unfair labor practice charges by the Board, despite the absence of a preexisting bargaining relationship between the parties.

On March 25, 1976, the Board issued its decision and order in the case (223 NLRB No. 41; App., *infra*), upholding, with slight modification, the Administrative Law Judge's decision (Pet. App. E, pp. 46a-135a). The Board found that the companies had violated Sections 8(a)(1), (3) and (5) of the Act, and it ordered them, *inter alia*, to bargain with the union upon request (App. *infra*, pp. 3a-4a, 7a).

Since the Board has issued its final decision and order in this case, the question presented in the petition has become moot. As this Court explained in *Sears, Roebuck & Co.* v. *Carpet Layers, Local 419*, 397 U.S. 655, 658-659 (*per curiam*), in holding that a final decision by the Board had mooted a proceeding under the similar provisions of Section 10(*l*) of the Act, 29 U.S.C. 160(*l*):

> [B]y its terms § 10(*l*) merely authorizes the issuance of an injunction "pending the final adjudication *of the Board* with respect to [the] matter." [Court's emphasis.] Once the Board has acted, it can itself seek injunctive relief from the Court of Appeals, pursuant to § 10(e) of the Act, which empowers that court to grant "such temporary relief or restraining order as it deems just and proper." [Citation and footnote omitted.] The legislative history makes

> clear that the purpose of enacting § 10(*l*) in 1947 was simply to supplement the pre-existing § 10(e) power of the Board by authorizing injunctive relief prior to Board action. [Footnote omitted.] It was thus relief prior to Board action that Congress was concerned with providing when it enacted § 10(*l*), and any injunction issued pursuant to that section terminates when the Board resolves the underlying dispute.

See also *Building & Construction Trades Council* v. *Samoff*, 414 U.S. 808; cf. *McLeod* v. *General Electric Co.*, 385 U.S. 533.

Although Section 10(j), unlike Section 10(*l*), does not, by its terms, limit the duration of injunctions issued thereunder to the period preceding "the final adjudication of the Board with respect to such matter" (see Pet. App. F, pp. 137a-138a), those sections were companion amendments to the Act and embody a similar legislative purpose. See Pet. 17-18, and *Sears, Roebuck & Co.* v. *Carpet Layers, Local 419*, *supra*, 397 U.S. at 658-659, n. 5. Congress presumably intended injunctions issued under Section 10(j) to have the same limited duration as those issued under Section 10(*l*). The considerations relied on in *Sears* also indicate that a Board decision moots a case under Section 10(j).

Therefore, the petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded to the district court with directions to dismiss the Section 10(j) proceeding as moot. *United States* v. *Munsingwear*, 340 U.S. 36;

Building & Construction Trades Council v. *Samoff*, *supra*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

APRIL 1976.

APPENDIX

223 NLRB No. 41

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 12—CA—6267 and
12—CA—6288

PILOT FREIGHT CARRIERS, INC. AND
BBR OF FLORIDA, INC.

and

TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 512, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Case 12—CA—6384

PILOT FREIGHT CARRIERS, INC.

and

TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 512, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On December 23, 1974, Administrative Law Judge Phil Saunders issued the attached Decision in this proceeding. Thereafter, the Respondents and the General Counsel filed exceptions and supporting

briefs and the Charging Party filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge [1] only to the extent consistent herewith.

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[1] The General Counsel and the Charging Party have excepted, *inter alia* to the Administrative Law Judge's finding that Lane's statements that he had spent $10,000 in attorney fees to counter the Union that otherwise would have gone to the employees was not unlawful. The Administrative Law Judge held that Lane had the rights to spend as much as he chose for an attorney and that whether or not any saving in that respect would have been passed on to the employees was speculative and solely in the control of management. We do not quarrel with the Administrative Law Judge's observation on the rights of employers to pay their attorneys, with his conclusion that it would be speculative to conjecture on who would benefit from any saving, nor even with his more questionable and ambiguous observation concerning the control of management over the disposition of any such saving—which is incorrect to the extent it might imply that an employer has a unilateral right to fix wages once the employees have selected a bargaining representative—but that is all beside the point. The point, and the vice of the statement, is the assertion that but for the Union the employees would have received $10,000 and the implication that further union activities would deprive the employees of pay they might otherwise receive. It is always speculative whether or not any promise of benefit or threat of reprisal will be carried out. We conclude that the

Although holding that a bargaining order was warranted under *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), the Administrative Law Judge found it unnecessary to decide whether or not the Respondents had violated Section 8(a)(5) of the Act, on the basis of *Steel-Fab, Inc.*, 212 NLRB 363 (1974), and dismissed the 8(a)(5) allegations. Since the Administrative Law Judge's Decision issued, the Board has reconsidered the policy enunciated in *Steel-Fab* and substantially modified it, concluding that finding violations of Section 8(a)(5) in *Gissel-type* refusal-to-bargain cases are not superfluous. *Trading Port, Inc.*, 219 NLRB No. 76 (1975).

Accordingly, and for the reasons fully set forth in the body of the Administrative Law Judge's Decision, we specifically adopt paragraph 6 of his Conclusions of Law and hold that the Respondents violated Section 8(a)(5) of the Act by refusing to bargain with the Union on and after February 14, 1974, the date of the Union's demand for recognition. At that time the Union possessed a majority of authorization cards from employees in the unit found appropriate and events rendering a free and fair election unlikely or impossible had already oc-

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statements violated Sec. 8(a)(1) of the Act and shall amend the Order and notice accordingly.

We also find merit to exceptions to the omission of the unit description, the name of the Union, and certain standard provisions from the Order and notice.

In the absence of exceptions, we adopt, *pro forma*, the Administrative Law Judge's rejection of the Respondents' defense that the Union discriminates against minorities.

curred. Under *Gissel*, *supra*, an employer violates Section 8(a)(5) of the Act when it refuses to recognize and bargain upon demand with a union whose majority status is established by cards, whether the unfair labor practices triggering the finding that the employer was under an obligation to bargain occur before, at the same time, or after the actual refusal to bargain.

Amended Remedy

Add the following to the third paragraph of the section of the Administrative Law Judge's Decision entitled "The Remedy."

"In addition, the Respondents shall make each of the unfair labor practice strikers whole for any loss of earnings suffered by reason of the Respondent's refusal, if any, to reinstate unfair labor practice strikers in the manner described above, by payment to him or her of a sum of money equal to that which he or she would have earned as wages during the period beginning 5 days after the date on which such employee applies for reinstatement and ending on the date which Respondents offer to reinstate such an employee. Backpay, where due, shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and shall include interest in the amount and manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Pilot Freight Carriers, Inc. and BBR of Florida, Inc., Jacksonville, Florida, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating their employees about their union activities.

(b) Threatening employees with discharges because of their union activities.

(c) Announcing and enforcing a rule prohibiting solicitations for the Union.

(d) Discouraging membership in the Truck Drivers, Warehousemen and Helpers Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of its employees, by discharging employees or otherwise discriminating against them in regard to their hire and tenure of employment or any term or condition of employment.

(e) Threatening to withhold benefits because of the union organizing campaign.

(f) Refusing to recognize and bargain with Truck Drivers, Warehousemen and Helpers Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of

America, as the exclusive collective-bargaining representative of the employees in a unit of all city pickup and delivery truckdrivers, over-the-road truckdrivers, and dockworkers employed by and/or jointly employed by Respondents, and working out of or at Pilot's Jacksonville, Florida, terminal, including regular part-time employees, but excluding casual employees, coordinators, office employees, guards, and supervisors as defined by the Act.

(g) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Reinstate Melvynn Johnston to his former position or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole in the manner set forth in the section entitled "The Remedy" for any loss of earnings suffered by reason of the discrimination against him.

(b) Reinstate upon their unconditional application to return to work the unfair labor practice strikers to their former positions or, if such positions no longer exist, to substantially equivalent ones, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings resulting from any failure to reinstate them, as provided in "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or appropriate to analyze the amount of backpay due under the terms of this Order.

(d) Upon request, recognize and bargain with Truck Drivers, Warehousemen and Helpers Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of the employees in the above-described unit respecting rates of pay, wages, hours, or other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(e) Post at their terminal in Jacksonville, Florida, copies of the attached notice marked "Appendix C." [2] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondents' representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respond-

[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

ents to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps the Respondent have taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

PETER D. WALTHER, Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX C

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT question employees about their union activities.

WE WILL NOT threaten to discharge employees because of their union activities.

WE WILL NOT threaten to withhold benefits from our employees because of a union organizing campaign.

WE WILL NOT make, announce, or enforce any rule which prohibits only union solicitations.

WE WILL NOT discharge or otherwise discriminate in regard to the hire and tenure of employment or any term or conditions of employment of our employees because of their membership in and activities on behalf of the Truck Drivers, Warehousemen and Helpers Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or of any other labor organization of their choice.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed in Section 7 of the Act.

WE WILL offer to Melvynn Johnston his former job or, if such job no longer exists, a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and we will pay him for any loss of pay he may have suffered by reason or our discrimination against him together with interest thereon.

WE WILL reinstate the unfair labor practice strikers not already working to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, upon their unconditional applications to return to work and make them whole for any loss of earnings resulting from our failure to reinstate them within 5 days from their unconditional requests.

WE WILL bargain collectively with Truck Drivers, Warehousemen and Helpers Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, respecting rates of pay, wages, hours, or other terms and conditions of employment, as the representative of our employee in the bargaining unit set forth herein, and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All city pickup and delivery truckdrivers, over-the-road truckdrivers, and dockworkers employed by and/or jointly employed by Pilot Freight Carriers, Inc., and BBR of Florida, Inc., and working out of or at Pilot Freight Carriers' Jacksonville, Florida, terminal, including regu-

> lar part-time employees, but excluding casual employees, guards, and supervisors as defined in the Act.

PILOT FREIGHT CARRIERS, INC.
(Employer)

Dated ——— By ———
(Representative) (Title)

BBR OF FLORIDA, INC.
(Employer)

Dated ——— By ———
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 706, Federal Office Building, 500 Zack Street, P.O. Box 3322, Tampa, Florida 33602, Telephone 813—228-2662.

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